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Supreme Court, U.S.
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CASE NO. 91-5843

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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October 15, 1991

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QUESTIONS PRESENTED

WHETHER THE TRIAL COURT AND THE FLORIDA SUPREME COURT CONSIDERED THE MITIGATING EVIDENCE PRESENTED.

WHETHER PETITIONER'S SENTENCE WAS SUBJECTED TO A PROPER HARMLESS ERROR ANALYSIS SUBSEQUENT TO INVALIDATION OF ONE OF FOUR AGGRAVATING FACTORS.

WHETHER PETITIONER'S CHALLENGE TO AN INSTRUCTION ON KIDNAPPING IS SUBJECT TO REVIEW BY THIS COURT IRRESPECTIVE OF THE PROCEDURAL DEFAULT FOUND TO EXIST BY THE FLORIDA SUPREME COURT.

WHETHER FLORIDA COURT'S APPLICATION OF THE AGGRAVATING FACTOR OF "HEINOUS ATROCIOIUS AND CRUEL" IS CONSTITUTIONAL ON ITS FACT AND AS APPLIED.

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OPINION BELOW

The opinion below has been reported as Sochor v. State, 580 So.2d 595 (Fla. 1991).

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts as accurate petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. Section 1257 (3).

STATEMENT OF THE CASE

The Florida Supreme Court rendered its decision on May 2, 1991. A motion for rehearing was denied on June 18, 1991. Petitioner is seeking certiorari review in this Court.

STATEMENT OF THE FACTS

For purposes of the argument below, respondent would rely on and incorporate by reference the facts as articulated by the Florida Supreme Court in its direct appeal opinion.

REASONS FOR DENYING THE WRIT

POINT I

THE FLORIDA COURTS CONSIDERED ALL THE MITIGATING EVIDENCE PRESENTED AND GAVE IT THE WEIGHT DEEMED APPROPRIATE

Petitioner claims that his death sentence is a violation of the Eighth Amendment of the United States Constitution. Specifically he challenges how the trial court and the Supreme Court considered the mitigating evidence presented. He claims that the Florida courts failed to consider both the statutory and nonstatutory mitigating evidence that was presented at sentencing.

Petitioner has failed to establish any constitutional violation. The record belies petitioner's claim that the state courts did not consider the mitigating evidence presented. In the sentencing order, under the heading regarding nonstatutory mitigating evidence, the trial judge stated that he considered the testimony of the various family members. (R. 1235, petitioner's Exhibit C). He concluded that the evidence did not rise to the level of nonstatutory mitigating evidence. (R. 1235). The Florida Supreme Court upheld that finding. Sochor v. State, 580 So.2d 595, 604 (Fla. 1991). As such petitioner's allegation that the courts did not consider the evidence presented is without merit. Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812, 821-822, 111 S.Ct. ___ (1991).

Furthermore as this Court has previously stated, a sentencer cannot refuse to consider relevant mitigating evidence, however, the weight to be given such evidence is within the sentencer's discretion. Eddings v. Oklahoma, 455 U.S. 104, 114, 71 L.Ed.2d 1, 11, 102 S.Ct. 869 (1982).

Also without merit is petitioner's claim that the Florida courts failed to weigh the statutory mitigating evidence. The trial court's order specifies what evidence was considered in determining the existence vel non of statutory mitigating evidence. (R. 1233-1235, petitioner's Exhibit C). The Florida Supreme Court also reviewed the evidence and likewise concluded that the mitigating evidence had not been established. Sochor, 580 So.2d at 604. Contrary to petitioner's assertions otherwise, the evidence presented in mitigation was not unrebutted. Doctors Livingston and Catillio testified that petitioner was either untruthful during his examination or that he had selective amnesia. (R. 718, 734,315). Although he claims that he had an alcoholic blackout the night of tne murder, he has given a detailed account of the night's events as well. (R. 736). Another psychologist testified that even if petitioner was intoxicated that night, he still would know that what he did was wrong. (R. 688).

Petitioner has failed to establish any constitutional violation. As stated by this Court on previous occasions, "It is not our role to reexamine the trial court's finding of fact, which have been affirmed by the Florida Supreme Court." Lewis v.

Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 623, 110 S.Ct. __ (1990) citing to Barclay v. Florida, 463 U.S. 939, 968, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983)(Stevens, J., concurring in judgment); Lewis, 111 L.Ed. 2d at 616-617; Walton v. Arizona, 497 U.S. ___, 111 L.Ed.2d 511, 524 110 S.Ct. ___ (1990).

Next petitioner makes a general attack against the Florida courts treatment of mitigating evidence. He claims that the Florida Supreme Court does not conduct its review in a rational and consistent manner. Petitioner further opines that the Supreme Court is inconsistent in attempts to "regularize" consideration of mitigating evidence. Petitioner's invitation to this Court, to conduct a de novo case-by-case comparison of the facts of other cases with the facts of the instant case has already been declined. Jeffers, 111 L.Ed.2d at 622.

Petitioner received an individualized sentencing determination as constitutionally required. Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812, 826, 111 S.Ct. __ (1991) quoting Zant v. Stephens, 462 U.S. 862, 879, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983). This Court should deny review.

POINT II

PETITIONER'S SENTENCE RECEIVED PROPER APPELLATE REVIEW SUBSEQUENT TO THE INVALIDATION OF AN AGGRAVATING FACTOR

Petitioner claims that the Florida Supreme Court did not conduct a harmless error analysis once it vacated the aggravating factor of "cold, calculated and premeditated". Rather than substantiate this allegation with any relevant facts from the instant case, petitioner compares this case to other capital cases. Such an analysis does not demonstrate constitutional error. Lewis v. Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 622, 110 S.Ct. __ (1990).

This Court has recognized that the Florida Supreme Court conducts a harmless error analysis when an aggravating factor has been vacated. Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812, 111 S.Ct. __ (1991). This Court has also stated that a primary concern in sentencing under the Eighth Amendment is that the sentence should be based on the facts and circumstances of the defendant, his background, and his crime. Clemons v. Mississippi, 494 U.S. __, 108 L.Ed.2d 725, 738, 110 S.Ct. __ (1990).

The Florida Supreme Court approved the trial court's findings that no statutory mitigating evidence existed. It also approved the trial court's finding that nonstatutory mitigating evidence was entitled to little weight. Sochor v. State, 580 So.2d 595, 604 (Fla. 1991). Given the fact that three aggravating factors still existed irrespective of the absence of

one factor, along with the fact that there was nothing in mitigation, resentencing was not required. Sochor. Furthermore, although irrelevant to this Court's concern, the Florida Supreme Court further found that petitioner's death sentence was proportionate to his crime. Id; Pulley v. Harris, 465 U.S. 37 (1984).

Under Clemons and Parker the Florida Supreme Court conducted a proper harmless error analysis. Petitioner's dissatisfaction with the Florida Supreme Court's findings does not amount to any constitutional violation. Jeffers, 111 L.Ed.2d at 622. Since petitioner has failed to demonstrate that any constitutional violation occurred, review must be denied.

POINT III

PETITIONER'S CHALLENGE TO A JURY INSTRUCTION ON KIDNAPPING IS PRECLUDED FROM FEDERAL REVIEW AS THE FLORIDA SUPREME COURT DETERMINED THAT ISSUE WAS NOT PRESERVED FOR REVIEW ON DIRECT APPEAL

Petitioner claims that one of the jury instructions read to the jury was done so in error because he was not charged with the crime applicable to the instruction. Petitioner alleges that he was denied due process since he was convicted of a crime for which he was never charged. Petitioner has failed to mention that this claim was precluded from review in state court since there was never any objection at trial to the instruction given. Sochor v. State, 580 So.2d 595, 601 f.n.8 (Fla. 1991). Nor has petitioner established the requisite cause and prejudice to overcome his procedural default. As such review is precluded. Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct. 1558, reh. denied (US) 73 L.Ed. 1296, 102 S.Ct. 2286 and reh. denied (U.S.) 73 L.Ed.2d 1361, 102 S.Ct. 2976 (1982); Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977).

Petitioner has failed to demonstrate any constitutional error. Petitioner was charged with kidnapping with the intent to commit or facilitate commission of any felony. Section 787.01 (1)(a)(2), Florida Statutes. The specific felony relied upon was sexual battery. The instruction however, encompassed Sections 787.01 (1) (a) (2) and (3). Section (3)

requires proof that the kidnapping was committed with the intent to inflict bodily harm or to terrorize the victim. No objection was made to the instruction. It was clear that the state was relying upon the evidence that petitioner kidnapped the victim in order to commit a sexual battery upon her. All the evidence presented and argument made by the prosecution demonstrated that the state was relying on that single theory. There was sufficient evidence to establish that charge. Sochor, 580 So.2d at 599-600. The allegation that petitioner was convicted under 787.01 (1)(a)(3) is mere speculation without any record support. Furthermore unlike the cases relied upon by petitioner, Dunn v. United States, 442 U.S. (1979) and Cole v. Arkansas, 333 U.S. 196 (1948) there was no variance between the evidence alleged in the indictment and the evidence produced at trial. Petitioner's attempt to commit a sexual battery upon the victim is certainly sufficient evidence of an attempt to commit bodily harm upon or terrorize the victim. Sochor.

Likewise without merit is petitioner's claim that the state proceeded under uncharged theories involving felony murder. The jury was clearly instructed that the underlying felonies regarding the felony murder doctrine were either kidnapping or sexual battery. Petitioner never requested that the state elect which theory it was proceeding under, i.e., premeditated or felony murder. Furthermore there is no state or federal constitutional requirement to do so. Schad v. Arizona, 501 U.S. __, 115 L.Ed.2d 555, 111 S.Ct. __ (1991).

Petitioner has failed to overcome his procedural default or failed to establish any constitutional violation to warrant review by this Court.

POINT IV

FLORIDA COURTS APPLICATION OF THE AGGRAVATING FACTOR OF "HEINOUS ATROCIOUS AND CRUEL" IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO PETITIONER'S SENTENCE

Petitioner claims that Florida's application of the "heinous atrocious and cruel" aggravating factor is unconstitutional irrespective of this Court's approval of same in Proffitt v. Florida, 428 U.S. 242 (1976). Specifically petitioner attacks the constitutionality of the instruction given in the instant case as well as its application by the trial court and subsequent approval by the Florida Supreme Court. Petitioner has failed to establish any constitutional error, consequently review must be denied.

Florida's application of the "HAC" factor has withstood constitutional scrutiny. Proffitt. This Court reiterated that finding recently in Lewis v. Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 619, 110 S.Ct. __ (1990) and Walton v. Arizona, 497 U.S. __, 111 L.Ed.2d 511,529, 110 S.Ct. __ (1990). The trial court made explicit factual findings which were upheld by the Florida Supreme Court. (R. 1233-1235, petitioner's Exhibit C). Sochor, 580 So.2d at 603. There is no constitutional infirmity in the application of this aggravating factor to the facts of the case sub judice. Furthermore this Court again should decline an invitation to conduct a de novo case-by-case comparison of other Florida cases with the facts of the instant case. Lewis V. Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 622, 110 S.Ct. __ (1990).

CONCLUSION

WHEREFORE, based on the forgoing facts and relevant case law, respondent respectfully requests that this Court DENY petitioner's request for certiorari review.

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CERTIFICATE OF SERVICE

I, Joan Fowler, a member of the Bar of this Court, hereby certify that on this 15th day of October, 1991, a copy of the Petition for Writ of Certiorari in the above-entitled case was furnished by courier to: GARY CALDWELL, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, counsel for the petitioner herein. I further certify that all parties required to be served have been served.

Joan Fowler

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Counsel of Record

IN THE

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioner, Dennis Sochor, and moves this Court, pursuant to Rule 39.1, Rules of the Supreme Court, to declare him indigent and allow him to proceed in forma pauperis in this cause, in particular to waive any filing fees. As grounds therefore, Petitioner says:

1. Petitioner applies for a writ of certiorari to review the decision of the Supreme Court of Florida affirming his convictions and sentences for the offenses of first degree murder and kidnapping.

2. Petitioner was declared indigent in the state trial court and on his appeal to the state supreme court.

3. Petitioner has been incarcerated since his arrest in 1986 and has been indigent for all court proceedings since that time.

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4. Petitioner swears he is now indigent and without funds to pay any fees or costs in this action. Appendix A.

5. Federal statute requires all courts of the United States to allow commencement and prosecution of any suit without prepayment of fees or costs upon the showing made above. 28 U.S.C. §1915(a).

6. Refusal to allow petitioner to proceed in forma pauperis would deny him equal protection of the law, meaningful access to the courts, and due process of law since he cannot otherwise get the review to which a more affluent defendant would be entitled. See Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1029 (1959) (fees should be waived for discretionary appeal by indigent); Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) (fees should be waived for indigent prisoner seeking state habeas relief).

WHREFORE, Petitioner moves this Court declare him indigent and allow filing and prosecution of this petition without payment of any fees or costs.

Respectfully Submitted,

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Assistant Public Defender
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IN THE

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

I, DENNIS SOCHOR, being first duly sworn, depose and say:

1. I am the Petitioner in the above-styled cause.

2. In support of my Motion For Leave to Proceed In Forma Pauperis and waive any fees or costs therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in the petition for certiorari are:

1. Did the Florida trial and appellate courts violate the Eighth and Fourteenth Amendments by giving no weight to the mitigating evidence in imposing and reviewing petitioner's death sentence?

2. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?

3. In a capital case, does an instruction on an uncharged theory of guilt violate the Fifth, Sixth, Eighth, or Fourteenth Amendments?

4. Did the application of Florida's "especially heinous, atrocious or cruel" aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?

3. I further swear that the following statements relating to my ability to pay the cost of prosecuting the petition are true:

a. I am not now employed and have not been employed since my incarceration began in 1986.

b. In the past twelve months, I have not received any income from any form of business, profession, or employment, rent, dividends, interest, or any such source.

c. I have no savings or checking accounts except a prison inmate account. The current balance of that account is $ 45.00 .

d. I own no real estate, stocks, bonds, notes, automobiles, or any other valuable property.

e. No people are dependent on me for support.

3. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Dennis Sochor

Dennis Sochor

SUBSCRIBED AND SWORN To before me this 5th day of September, 1991.

Susan Cary

NOTARY

My commission expires:

NOTARY PUBLIC UNDERWRITERS